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KHALID YUSOFF

v.

PERTUBUHAN BERITA NASIONAL MALAYSIA (BERNAMA) & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 23 NCVC-62-07-2013]
19 SEPTEMBER 2014

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TORT: *Defamation - Publication of defamatory words - Article based on judicial proceedings of plaintiff's criminal case - Plaintiff convicted for falsifying results of candidates in examination - Whether words "for financial benefit" in article meant plaintiff altered results of examination*
D *for financial benefit - Whether words complained of capable of bearing defamatory meaning - Whether words complained of referred to plaintiff - Whether there was malice on defendants' part when publishing article - Whether defendants acted in bad faith - Whether defendants liable to plaintiff for defamation - Defamation Act 1957, s. 12(1)*

E

TORT: *Defamation - Defences - Justification - Publication of defamatory words - Article based on judicial proceedings of plaintiff's criminal case - Plaintiff convicted for falsifying results of candidates in examination - Whether words in impugned article true in substance and*
F *in fact - Whether defence of justification allowed*

TORT: *Defamation - Defences - Absolute privilege - Publication of defamatory words - Article based on judicial proceedings of plaintiff's criminal case - Plaintiff convicted for falsifying results of candidates in examination - Whether article a fair, accurate and contemporaneous report*
G *- Whether words "for financial benefit" a fair and bona fide comment - Whether protected by defence of absolute privilege - Defamation Act 1957, s. 11*

TORT: *Defamation - Defences - Qualified privilege - Publication of*
H *defamatory words - Article based on judicial proceedings of plaintiff's criminal case - Plaintiff convicted for falsifying results of candidates in examination - Whether a matter of public interest - Words complained of - Whether "for financial benefit" were neutral words and not defamatory - Whether article published a fair account of judicial proceedings -*
I *Whether defendants protected by defence of qualified privilege in form of Reynolds privilege*

The plaintiff was the Director of Examinations for the Certificate In Legal Practice ('CLP') and was a person of considerable repute. On 20 April 2009, the first defendant ('BERNAMA'), a Malaysia National News Agency and disseminator of news often quoted and relied on by other news agencies in Malaysia, published in its online news portal a news report or article entitled "Court Upholds Jail Term On Former CLP Director" ('BERNAMA article'). The fourth defendant, who was the proprietor, printer and publisher of the online news portal known as "The Nut Graph" republished in its online news portal the BERNAMA article on the same day. A day later, the second defendant had on 21 September 2009 published in the New Straits Times an article entitled "Former CLP Director Loses Appeal", the contents of which were substantially sourced from the BERNAMA article. The plaintiff's action for defamation against the first, second and fourth defendants was based on the publication of the words "for financial benefit" ('the words complained of') contained in the impugned BERNAMA article by the first defendant, and which was published by the second and fourth defendants. The plaintiff claimed that the words complained of, in their natural and ordinary meaning, meant or were understood to mean that the plaintiff was convicted of altering the results of the CLP examination "for financial benefit". The plaintiff alleged that he had been defamed and now claimed for damages. The issues that arose were (i) whether the words complained of were defamatory; and (ii) whether the first, second and fourth defendants were liable for defamation based on their defences of justification, absolute privilege and qualified privilege.

Held (dismissing plaintiff's claim):

(1) The words complained of were capable of bearing a defamatory meaning and were defamatory of the plaintiff because of their imputation which tended to lower the plaintiff in the estimation of right thinking members of society generally and cause others to shun or avoid the claimant and expose the claimant to hatred, contempt or ridicule. It was not in dispute by the parties that the words complained of refer to the plaintiff and that the plaintiff's name was stated in the impugned article. It was also not in dispute that the words complained of were published by the respective defendants. (para 24)

(2) Justification is a complete defence to an action for defamation if the defendant succeeded in proving that the words complained of are true, in substance and in truth. The plaintiff agreed that because he had been found guilty and convicted by the Sessions Court, the Sessions Court had viewed him as having acted dishonestly and fraudulently. The plaintiff also agreed that he was a criminal who had been found guilty and convicted, sentenced to imprisonment and that such a person could not be trusted to hold office. The plaintiff further agreed that because of the fact that he was found guilty of cheating and deceiving, he was considered a person of low morals. From the plaintiff's own testimony, other than the words "for financial benefit", the other words in the impugned paragraph were true. All the other words were not defamatory because they were true in substance and in fact. So long as the gist or sting of the other words in the article published were true, the defence of justification, based on substantial truth, should be allowed (*Dato Seri Nizar Jamaluddin v. Sistem Television Malaysia Berhad & Anor*, refd). Thus, the defendants were not liable to the plaintiff for defamation. (paras 32, 33, 39, 47 & 50)

(3) Guided by the common law principles which have been statutorily provided in s. 11 of the Defamation Act 1957, what the defendants published was regarding the judicial proceedings on the plaintiff's criminal case in the Sessions Court and the High Court. The first defendant was a statutory body established under the Bernama Act 1967. It was the statutory duty of BERNAMA to provide complete, objective and impartial news, and to report such news truthfully and fairly. The first defendant's article was a report of the judicial proceedings. Even if the article and the impugned paragraph were not 100% accurate, in that the words for "financial benefit" should not have been published, on the whole, the article with the impugned paragraph was a "fair and accurate" and "contemporaneous report" of the judicial proceedings publicly heard and the extra words *ie*, the words complained of, was a fair and *bona fide* comment thereon, and hence protected by absolute privilege. (paras 55, 58, 59 & 60)

(4) The publication concerned a matter of public interest since it reported on the conduct of the plaintiff, then the Director of Examinations for the CLP examination. He was convicted for the offence involving dishonesty *ie*, falsifying the results of candidates in the CLP examination. It impacted on the integrity of the professional legal education system in the country and brought the same into public dispute. Further, the defendants had published the article which was substantially a fair account of the judicial proceedings. The article, read as a whole, was substantially fair except for the words "for financial benefit". Those words, by themselves, were not capable of being defamatory of the plaintiff. Even the plaintiff himself, under cross-examination, agreed that those words "for financial benefit" by themselves were neutral words, and were not defamatory. The defendants were therefore protected fully by the defence of qualified privilege in the form of the *Reynolds* privilege. (paras 62-64, 70 & 71)

(5) The plaintiff had at no time adduced any cogent evidence of malice on the part of the defendants. There was no proof that the defendants acted in bad faith to "misinform" or confuse the members of the public. On the other hand, the defendants had shown that they had published the article and the words complained of in all honesty, in good faith and without any actual or express malice. It would be wrong to infer or presume malice on the part of the defendants just by the mere fact that the words complained of were published. Under s. 12(1) of the Defamation Act 1957, the words complained of that were published or re-published by the defendants, were privileged since the plaintiff failed to prove that the publication or re-publication thereof, within the context of the whole article, was made with malice by the defendants. Thus, the first, second and fourth defendants were not liable to the plaintiff for defamation. (paras 74, 77 & 80)

Case(s) referred to:

Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***

Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***

Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor [2014] 3 CLJ 560 CA ***(refd)***

Jameel v. Wall Street Journal Europe Sprl [2007] 1 AC 359 (HL) ***(refd)***

JB Jeyaretnam v. Goh Chok Tong [1984] 1 LNS 139 HC ***(refd)***

Khalid Abdul Samad v. Datuk Aziz Isham & Anor [2011] 1 LNS 1161 HC ***(refd)***
Kimber v. The Press Association, Ltd [1893] 1 QB 65 ***(refd)***
Lim Guan Eng v. Utusan Melayu (M) Bhd [2012] 2 CLJ 619 HC ***(refd)***
Reynolds v. Times Newspapers Ltd [2001] 2 AC 127 ***(refd)***
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 1 LNS 146 HC ***(refd)***
Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***
Turner v. Sullivan and Others [1862] 6 LT (NS) 130 ***(refd)***

Legislation referred to:
Bernama Act 1967, s. 4(1)
Defamation Act 1957, ss. 8, 11, 12(1), (2)
Penal Code, ss. 415, 417, 468

Other source(s) referred to:
Duncan and Neill on Defamation, 3rd edn, p 107
Gatley on Libel and Slander, 11th edn, 2008, pp 11, 12, 198
Gatley on Libel and Slander, 12th edn, p 514
Prosser & Keeton On Torts, 5th edn, 1984, p 842

For the plaintiff - Muhammad Nizamuddin Hamid (Muhammad Afiq with him); M/s Nizamuddin Hamid & Co
For the 1st defendant - Bhag Singh; M/s Bhag Sulaiman & Co
For the 2nd defendant - Rueben Mathiavaranam (Lim Qi Si with him); M/s TH Liew & Partners
For the 4th defendant - Chan Kheng Hoe (Yang Lee Yuen with him); M/s Kheng Hoe & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Yeoh Wee Siam J:

Parties

[1] This judgment is in respect of the plaintiff's claim against the first, second and fourth defendants for libel.

[2] The plaintiff's claim against the third defendant has been withdrawn by the plaintiff at the outset of the hearing on 23 June 2014, and accordingly it was struck out by the court with no order as to costs.

Brief Facts

[3] At the material time, the plaintiff was the director of examinations for the Certificate in Legal Practice ("CLP"). He claims to be a person of considerable repute (statement of claim ("SOC") paras. 1-7, and plaintiff's witness statement, PW1-WS, Answers 1-5).

[4] The first defendant, a statutory body, was established under the Bernama Act 1967, and known by its acronym, "BERNAMA". BERNAMA is the Malaysia National News Agency and a disseminator of news often quoted and relied on by other news agencies in Malaysia.

[5] The second defendant is the proprietor, printer and publisher of the print edition of the English language newspaper known as "New Straits Times" ("NST").

[6] The fourth defendant is the proprietor, operator and publisher of the online news portal known as "The Nut Graph", accessible at www.thenutgraph.com.

[7] The first defendant had on 20 April 2009 published in its online news portal accessible at www.bernama.com a news report or article entitled "Court Upholds Jail Term On Former CLP Director" ("BERNAMA article" or "article") (CBOD1 Pt B p. 1).

[8] The fourth defendant had also on the same day, 20 April 2009, republished in its online news portal the BERNAMA article referred to in para. 7 above (CBOD1 Pt B pp. 4-5).

[9] A day later, the second defendant had on 21 April 2009 published in the NST an article entitled "Former CLP director loses appeal" (CBOD1 Pt B p. 3), the contents of which were substantially sourced from the BERNAMA article referred to in para. 7 above.

[10] The plaintiff is aggrieved with the words complained of, which are common to all the three respective articles ("articles" or "article", as the case may be) and commenced this defamation action.

The Plaintiff's Claim

[11] The plaintiff's claim is set out in his SOC (BOP, Tab A).

[12] The plaintiff's action for defamation against the first, second and fourth defendants ("the three defendants") is based on the publication of the words "for financial benefit" ("the words complained of") contained in the impugned BERNAMA article (CBOD Pt B p. 3, third paragraph) by the first defendant, and which were republished by the second and fourth defendants. The plaintiff claims that the words complained of are defamatory of him, as pleaded and set out in para. 16 of the SOC (BOP, Tab A, p. 12).

[13] The words complained of appear as follows in the impugned articles:

> Khalid, 57, also former Law faculty dean of Universiti Teknologi Mara had been convicted of altering the results of CLP examination **for financial benefit** at the Legal Profession Qualifying Board office in Menara Tun Razak, Jalan Raja Laut, between August and September 2001. (emphasis added).

[14] The plaintiff claims that the words complained of, in their natural and ordinary meaning, meant or were understood to mean the meanings as set out in para. 19 of the SOC (BOP, Tab A, p. 14).

[15] The plaintiff alleged that he has been defamed and now claims, *inter alia*, general damages, aggravated damages and exemplary damages.

[16] Further, the plaintiff prays for an injunction against the defendants restraining them from publication of the words complained of or any words which are defamatory of and concerning the plaintiff.

Evaluation And Findings

The Article Published By The First Defendant

[17] The whole article published on 20 April 2009 at 3.33pm by the first defendant, containing the words complained of in the third paragraph, reads as follows:

Court Upholds Jail Term On Former CLP Director

KUALA LUMPUR, April 20 (BERNAMA) – The High Court upheld today the three-month jail sentence imposed on former Certificate in Legal Practice (CLP) examination director Khalid Yusoff.

In dismissing Khalid's appeal against conviction and sentence here, Judicial Commissioner Zainal Azman Abdul Aziz said that the Sessions Court's decision on July 31, 2007 was accurate and that miscarriage of justice had not occurred.

Khalid, 57, also former Law Faculty dean of Universiti Teknologi Mara had been convicted of altering the results of CLP examination ***for financial benefit*** *at the Legal Profession Qualifying Board office in Menara Tun Razak, Jalan Raja Laut, between August and September 2001.*

He had also been found guilty of cheating the board into believing that the examination master list contained marks given by examiners and inducing the board to approve the list at the same place and time.

Khalid, a father of three, was in court throughout the appeal proceedings after he was released on RM20,000 bail with one surety.

After delivering the verdict, Zainal granted Khalid, represented by lawyer Khalid, a stay of sentence pending a further appeal.

Earlier he said that in the case, he took into consideration three main issues, namely the examination marking scheme, transfer of marks and document forgery.

He said that when Khalid took over the handling of the examination from Prof Datuk P Balan, he had received guidance and briefing from Balan on all aspects of handling the examination.

"It was impossible to say that Khalid did not know the marking scheme and Balan's evidence showed that the scheme was kept in a safe at the CLP office and Khalid knew about the scheme," said Zainal.

On the transfer of marks issue, he said, typist Hanizah Dol who worked with Khalid had given evidence that Khalid had used a pen to alter the marks in the master list and the accused had ordered him to type the altered marks.

A "The witness' evidence was so clear that Khalid had changed the marks even though he did not have authority to do so," Zainal said.

He said two examiners – Saseedharan Menon and K Chandra – had also given evidence that they only gave recommendations and
B that it was Khalid who had altered the marks himself.

He said although Khalid depended largely on the recorded statement of the late Tan Sri Moktar Abdullah that the moderation process on the marks must be done professionally, the examination director was not given a free hand to handle the
C examination.

"When Khalid was questioned by the Qualifying Board on Sept 13, 2001 about his action in altering the marks, Khalid kept his silence without giving any excuse.

D "During the trial, the prosecution had proven that the document had been falsified by Khalid and he had deliberately used the document to deceive the board," Zainal said.

Deputy Public Prosecutor Raja Rozela Raja Toran appeared for the prosecution. (CBOD1 Pt B p 1) (emphasis added).
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(See also the article which was re-published by the second defendant in CBOD1 Pt B p. 3, and by the fourth defendant in CBOD1 Pt B pp. 4-5).

F *Whether The Words Complained Of Are Defamatory*

[18] It is trite law that in order to prove defamation, the following three elements have to be proved by the plaintiff:

G (i) The statement must be capable of bearing a defamatory meaning;

(ii) The statement must refer to the plaintiff; and

(iii) The statement must be published by the defendants to a third
H person(s).

(See *Gatley on Libel and Slander* 11th edn. 2008 pp. 11 and 12, *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321, *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461, *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu*
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Berhad & Anor [1973] 1 LNS 146; [1973] 2 MLJ 56, *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304, and *JB Jeyaretnam v. Goh Chok Tong* [1984] 1 LNS 139).

[19] The above three elements to be proved by the plaintiff at the first stage of the court's adjudication of a defamation suit.

[20] Once the three elements have been proved to the satisfaction of the court, the burden of proof then shifts to the defendant to prove, based on credible evidence of the pleaded defence(s) of the defendant, that the words complained of are not defamatory.

[21] In this second stage of the enquiry, the court would, on an assessment of the facts, ascertain whether the words complained of are in fact defamatory.

(See *Lim Guan Eng v. Utusan Melayu (M) Bhd* [2012] 2 CLJ 619 and *Chok Foo Choo v. The China Press Bhd* (*supra*)).

[22] Learned counsels for the first and second defendants respectively have graciously conceded at the outset of their respective written submissions, that the three elements required to be proved at the first stage of the enquiry have been satisfied. They then proceeded to submit regarding the respective defence(s) for the second stage of the enquiry.

[23] There is no similar concession by learned counsel for the fourth defendant.

[24] Be that as it may, from the evidence adduced by the plaintiff, the court is satisfied that the three elements have been proved as follows:

(i) The words complained of are capable of bearing a defamatory meaning. The court finds that in all the documents relevant to the plaintiff's case namely, the charges, the judgment of the Sessions Court Judge, the notes of proceedings, the judgment of the High Court in dismissing the plaintiff's appeal against the decision of the Sessions Court Judge, and even in any past news report or articles by the first defendant or any news agency, is there any use of the words complained of, "for financial benefit", in connection with the commission of the offences by the plaintiff on the two charges filed against him.

Clearly, the words complained of are defamatory of the plaintiff because of their imputation which tends to '... (1) lower the plaintiff in the estimation of right-thinking members of society generally; (2) ... cause others to shun or avoid the claimant; (3) ... expose the claimant to "hatred, contempt or ridicule ..." ' (see *Gatley on Libel and Slander* 11th edn. 2008 p. 12).

(ii) It is not in dispute by both parties that the words complained of refer to the plaintiff. In any case, the plaintiff's name is stated in the impugned article.

(iii) It is also not in dispute that the words complained of were published by the respective defendants.

The second and fourth defendants republished the article which was first published by the first defendant.

In *Gatley on Libel and Slander*, 11th edn. 2008 at p. 198 it is stated:

> At common law every republication of a libel is a new libel and, if committed by different persons, each one is liable as if the defamatory statement had originated with him.
>
> ...
>
> The rules applies even if the defendant believes the statement to be true and even if he names his sources.

[25] In *Khalid Abdul Samad v. Datuk Aziz Isham & Anor* [2011] 1 LNS 1161 Dr Prasad Sandosham Abraham J stated:

> The impugned Article in question was republished by the 2nd Defendant *in toto* having extracted the impugned article from the Official Blog of YB Zulkifli Noordin, a fact not in dispute. In *Gatley on Libel and Slander* Eighth Edition at p 117, and I quote:
>
> > *Every republication of a libel is a new libel and each publisher is answerable for his act to the same extent as if the calumny originated with him.*
>
> (See *Truth (N.Z.) Ltd v. Holloway* [1960] 1 W.L.R. pg. 1000-1003) a decision of the Privy Council. It is no defence to an action for republication that the Defendant received the libelous statement from another whose name was disclosed at time of publication as is the situation in our case. The 2nd Defendant

who republishes the impugned article is deemed to have approved endorsed or repeated the same. However the defences of privilege and justification would be available to the Defendants.

I find the impugned Article bears the defamatory meanings as pleaded by the Plaintiff and the Plaintiff has discharged the general burden of proof on the Plaintiff to show the same. I now turn to consider the various defences raised by the Defendants.

[26] In accordance with *Gatley* (*supra*) and the above decision, it matters not whether the defendant published or republished the article. Every publisher of the words complained of is liable for the defamatory words.

[27] The court holds that the three elements have been proved by the plaintiff. The first, second and fourth defendants have in fact published or republished, as the case may be, the words complained of which are defamatory of the plaintiff as pleaded in the SOC.

Whether The First, Second And Fourth Defendants Are Liable For Defamation Based On Their Respective Defences

[28] In brief, the following are the respective defences raised:

First Defendant

(i) Absolute privilege : s. 11 of the Defamation Act 1957 ("DA"); a fair and accurate report.

(ii) Qualified privilege : at common law: substantially a fair account; no malice;

Second Defendant

(i) Justification : doctrine of substantial justification;

: s. 8 of the DA;

(ii) Qualified privilege : based on the Reynolds principle of publication, or Reynolds privilege.

Fourth Defendant

(i) Justification : s. 8 of the DA;

: substantially true;

A (ii) Absolute privilege : s. 11 of the DA;

(iii) Qualified privilege : at common law;

: ancillary derivative privilege ie, also relying on qualified privilege as raised by the first and second defendants. If the court finds in favour of the first and second defendants, then the fourth defendant submits that the same privilege would extend to the fourth defendant.

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[29] The court would now consider the defences:

Justification

D **[30]** Justification is a complete defence to an action for defamation if the defendant succeeds in proving that the words complained of are true, in substance and in truth (see *Duncan and Neill on Defamation* third edn. p. 107 para. 12.01).

E **[31]** The above impugned paragraph of the article ("the impugned paragraph") containing the words complained of has two parts to it, namely:

(i) The plaintiff had been convicted of altering the results of the CLP examination ("first part"); and

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(ii) The plaintiff did so for financial benefit ("the second part").

[32] Regarding the first part, the court finds the preponderance of evidence to prove that it is true in substance and in fact. This is shown in the following:

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(i) The plaintiff (PW1), under cross-examination by learned counsel for the second defendant, agreed that minus the words "financial benefit", the other words in the impugned paragraph are a reflection of the High Court's grounds of H judgment dated 4 May 2009 where it specifically stated the fact that the plaintiff was indeed found guilty and convicted by the Kuala Lumpur Sessions Court ("the Sessions Court") of the charge of altering the results of the CLP examination (CBOD1 Pt B pp. 54-56 paras. 1-4);

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(ii) The plaintiff further agreed that it is true that he had been found guilty of and convicted of both charges;

(iii) When it was put to him in the same cross-examination by learned counsel for the second defendant, the plaintiff agreed that minus the words "financial benefit", the other words in the impugned paragraph conveyed the imputation that he had dishonestly, wrongfully and fraudulently altered the CLP examination results, he cannot be trusted to hold office, and he is of low morals;

(iv) During cross-examination by learned counsel for the fourth defendant, the plaintiff agreed that because he had been found guilty and convicted by the Sessions Court, the Sessions Court had viewed him as having acted dishonestly and fraudulently. The plaintiff also agreed that because of the fact that he is a criminal who had been found guilty and convicted, and sentenced to imprisonment, such a person cannot be trusted to hold office. When it was put to him, the plaintiff further agreed that because of the fact that he was found guilty of cheating and deceiving, he is considered a person of low morals. Finally, in the same cross-examination, the plaintiff confirmed that his complaint was only regarding the words 'for financial benefit', and not regarding the other words in the article.

[33] So, even from the plaintiff's own testimony, other than the words "for financial benefit", the other words in the impugned paragraph are true. Therefore, except for those words complained of, the rest of the impugned paragraph are true, in substance and in fact.

[34] The court examined the two charges brought against the plaintiff by the prosecution in the Sessions Court:

Pertuduhan Pertama

Bahawa kamu di antara bulan Ogos 2001 dan 13hb September 2001 di pejabat Lembaga Kelayakan Profesion Undang-Undang Malaysia, Tingkat 27, Menara Tun Razak, Jalan Raja Laut, di dalam Wilayah Persekutuan Kuala Lumpur telah memalsukan suatu dokumen iaitu "master list" keputusan peperiksaan Sijil Amalan Guaman Julai 2001 dengan niat ianya digunakan untuk tujuan menipu dan dengan itu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 468 Kanun Keseksaan.

Pertuduhan Kedua

Bahawa kamu pada 13.09.2001 di pejabat Lembaga Kelayakan Profesion Undang-Undang Malaysia, Tingkat 27, Menara Tun Razak, Jalan Raja Laut, di dalam Wilayah Persekutuan Kuala Lumpur telah menipu Lembaga Kelayakan Profesion Undang-Undang Malaysia dengan memperdayakan mereka untuk mempercayai bahawa "master list" keputusan peperiksaan Sijil Amalan Guaman Julai 2001 adalah keputusan yang benar yang diberi oleh pemeriksa-pemeriksa peperiksaan tersebut dan dengan demikian telah dengan sengaja mendorong mereka untuk meluluskan "master list" tersebut yang mana mereka tidak akan melakukannya sekiranya tidak diperdayakan sedemikian, dan dengan itu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 417 Kanun Keseksaan. (CBOD1 Pt B pp. 54-55).

[35] The first charge is under s. 468 of the Penal Code for the offence of forging the "master list" for the CLP examination results with the intention of cheating.

[36] The second charge is for inducing the CLP Board, Malaysia to believe that the "master list" of the CLP examination results are the true results given by the examiners and intentionally caused them to approve such list, which they would not have done so, if they had not been so deceived.

[37] Both charges must be read together with the substantive provision on the offence of cheating which is provided in s. 415 of the Penal Code which reads as follows:

415. Cheating

Whoever by deceiving any person, whether or not such deception was the sole or main inducement,

(a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property; and

(b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived any which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property,

is said to "cheat".

[38] The plaintiff had committed two serious offences of forgery and cheating which punishment is provided in s. 468 and s. 417 of the Penal Code respectively as follows:

> 468. Forgery for the purpose of cheating.
>
> Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.
>
> 417. Punishment for cheating.
>
> Whoever cheats shall be punished with imprisonment for a term which may extend to five years, or with fine, or with both.

[39] As submitted by learned counsels for the second and fourth defendants respectively, the sting is in the rest of the other words in the article and in the impugned paragraph, and not in the words "for financial benefit". Though all the other words sting, they are not defamatory because they are true in substance and in fact ie, the plaintiff had been convicted for two serious offences of forgery and cheating, which contain elements of fraud, dishonesty and deception. Such conviction proves that the plaintiff is of low morals, and not fit to hold public office and this would cause him to be held in low esteem by members of the public. This certainly had damaged the plaintiff's reputation which was already in tatters when he was first suspended from work, pending investigation and criminal prosecution against him.

[40] It must be borne in mind that the whole of the article, and the impugned paragraph, minus the words complained of, are true at the material time. At that point in time, the High Court had upheld the Sessions Court judgment in finding the plaintiff guilty and convicting him of the two charges. At the time of publication or re-publication of the article, the High Court judgment had not been reversed by the Court of Appeal yet. Thus, except for the words complained, everything else in the article and the impugned paragraph is true.

[41] As for the second part, there is no direct evidence that the plaintiff committed the offence for financial benefit.

[42] Learned counsel for the plaintiff submitted that there is no evidence at all that the plaintiff altered the CLP examination marks with the motive of getting any financial benefit. The plaintiff did alter the CLP examination marks, but not for financial benefit. Therefore, the words complained of are clearly defamatory of the plaintiff.

[43] The plaintiff, under cross-examination by learned counsel for the fourth defendant, agreed that he was holding a salaried position as the director of the CLP board, and his position was of financial benefit to him ie, he was paid a salary.

[44] Learned counsel for the fourth defendant drew this court's attention to the judgment of the Sessions Court dated 31 July 2007 where it was stated:

> This deception by the accused led to an advantage for him. The QB was deprived of the knowledge that there was a poor pass percentage of less than 12 percent for which the accused would have to explain. (Note: "QB" refers to Qualifying Board).

[45] This court accepts the submissions of learned counsel for the fourth defendant that whilst it may be true that the actual charges did not involve an accusation of financial benefit, it is true that the plaintiff did financially benefit from his wrongdoing indirectly ie, his wrongdoing was advantageous to him, for retaining his position, which position brought about a financial benefit to himself, as the plaintiff's position was salaried.

[46] Thus, under the first and second parts of the impugned paragraph, the first and fourth defendants have shown to the court that the contents thereof are true.

[47] Even if the second part is not true, on the whole, the contents of the impugned paragraph are substantially true. If one were to read the article as a whole, minus the words "for financial benefit", everything written there is true, and the words "for financial benefit" made no difference to the truth about the plaintiff. So long as the gist or sting of the other words in the article published are true, the defence of justification, based on substantial truth, should be allowed, even if the second part cannot be proven to be true (see also *Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor* [2014] 3 CLJ 560, and *Prosser & Keeton On Torts* 5th edn 1984, sec 116 at p. 842).

[48] Section 8 of the DA provides as follows:

> Justification
>
> 8. In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[49] Applying s. 8 of the DA to this case, the defence of justification specifically pleaded by the first and fourth defendants cannot fail by reason only that the truth of the charge, namely the words "for financial benefit", are not proved, and these words complained of, by themselves, do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges ie, the truth of all the other words contained in the article, in particular the impugned paragraph regarding the plaintiff's conviction on the two charges.

[50] Based on this defence of justification alone, the court finds that the second and fourth defendants not liable to the plaintiff for defamation.

Absolute Privilege

[51] The first and fourth defendants rely on this defence of absolute privilege.

[52] Section 11 of the DA provides for the defence of absolute privilege as follows:

> Reports of judicial proceedings
>
> 11.(1) A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and *bona fide* comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of the publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation.

A (2) Nothing in this section shall authorize the publication of any blasphemous, seditious or indecent matter or any matter the publication of which is prohibited by law.

[53] As submitted by learned counsel for the first defendant, under common law, it has long been held for more then 150 years B that reports of court proceedings are privileged. This can be seen in the following decisions:

Turner v. Sullivan and Others [1862] 6 LT (NS) 130 where Byles J stated:

C

> By the law of the land every court of justice was a public place, where every man, woman and child had a right to come and hear what was done and see what passed; and further, they had a right when they retired to speak truly and fairly of everything they had heard and seen; and more than that, newspapers had a full D right to publish either a verbatim or an abridged and condensed report of what passed in such courts, and however it might affect the character or an individual, he had no ground for an action for libel, **unless it was an unfair report**. (emphasis added).

E **[54]** Again, in *Kimber v. The Press Association, Ltd* [1893] 1 QB 65, Lord Esher MR reiterated the above:

> The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open Court, then the publication, without malice, or F a fair and accurate report of what takes place before that tribunal is privileged. Under certain circumstances that publication may be very hard upon the person to whom it is made to apply, but public policy requires that some hardship should be suffered by individuals rather that that judicial proceedings should be held in secret. The common law, on the ground of public policy, G recognizes that there may be greater danger to the public in allowing judicial proceedings to be held in secret than in suffering persons for a time to rest under an unfounded charge or suggestion.

H **[55]** Guided by the above common law principles which now have been statutorily provided in s. 11 of the DA, this court holds the view that what the defendants published is regarding the judicial proceedings on the plaintiff's criminal case in the Sessions Court and the High Court.

I

[56] The first defendant is a statutory body established under the Bernama Act 1967. Section 4(1) of such Act provides as follows: A

> The objects of BERNAMA shall be:
>
> (a) to seek for and present complete, objective and impartial news or news material on any matter of public and national interests within and outside Malaysia; B
>
> (b) ...
>
> (c) to report truthfully and fairly, without prejudice to public and national interest, the views of all section of the population of Malaysia. C

[57] It is therefore the statutory duty of Bernama, being the national news agency, to provide complete, objective and impartial news, and to report such news truthfully and fairly. D

[58] The first defendant's article, which was reproduced by the fourth defendant, is a report of the judicial proceedings. The words "for financial benefit" are not specifically mentioned in the judicial proceedings, but from the proceedings it can be inferred that the plaintiff had a motive to commit the crime and such motive was probably in relation to the retention of his position as the director of the CLP Board. E

[59] Even if the article and the impugned paragraph are not 100% accurate, in that the words "for financial benefit" should not have been published, this court finds that on the whole, the article with the impugned paragraph are a "fair and accurate" and "contemporaneous report" of the judicial proceedings publicly heard, and the extra words, ie, the words complained of, are a fair and *bona fide* comment thereon, and hence protected by absolute privilege. F G

[60] This court holds the above view on the ground of public interest. To hold otherwise would mean that the public would be deprived of the opportunity to receive news of judicial proceedings, lest news agencies refrain from reporting judicial proceedings for fear of being sued for defamation even for unintentional and *bona fide* slip ups in the use of words or phrases in a fairly accurate report. H I

Qualified Privilege

Under Common Law

[61] In the landmark decision of *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127, the House of Lords laid down two requirements for the defence of qualified privilege in the form of the *Reynolds* privilege to apply, namely:

(a) that the publication concerned a matter of public interest; and

(b) that the steps taken to gather, verify and publish the information were responsible and fair (ie, responsible journalism).

[62] Regarding (a), in the present case, there is no doubt that the publication concerned a matter of public interest since it reported on the conduct of the plaintiff, then the director of examinations for the CLP examination. He was convicted for the offence involving dishonesty ie, falsifying the results of candidates in the CLP examination.

[63] In the words of the submissions of learned counsel for the fourth defendant, "It impacted on the integrity of the professional legal education system in the country and brought the same into public dispute".

[64] The public had a right to be informed of this matter (see DW2-WS, Q & A, Answers 9 & 10).

[65] The publication by the defendants therefore passed the first test.

[66] As for the second test, in order to determine whether the defendants practised responsible journalism, the following are the guidelines given in *Reynolds* (*supra*) by the House of Lords:

(i) Seriousness of the allegations;

(ii) Nature of the information and the extent to which the subject matter was of public concern;

(iii) The source of the information;

(iv) The steps taken to verify the information;

(v) The status of the information. The allegation may have already been the subject of an investigation which commands respect;

(vi) The urgency of the matter. News is often a perishable commodity;

(vii) Whether comment was sought from the plaintiff. An approach to the plaintiff will not always be necessary.

(viii) Whether the article contained the gist of the plaintiff's side of the story;

(ix) The tone of the article. A newspaper can raise queries or call for investigation. It need not adopt allegations as statements of fact; and

(x) The circumstances of the publication including timing.

[67] The guidelines given by the House of Lords are to be regarded merely as pointers and are not to be treated as hurdles to overcome the publisher (see *Jameel v. Wall Street Journal Europe Sprl* [2007] 1 AC 359 (HL)).

[68] Regarding the question of fairness, the essence is clearly spelt out in *Gatley On Libel And Slander*, 12th edn. p. 514:

> The privilege – a valuable privilege for the public of publishing reports of proceedings in a court of justice, would be useless if it were necessary to set out every word of the evidence and of the speeches and of what was said by the judge … that is not necessary; *if what is stated is substantially a fair account of what took place, there is an entire immunity for those who publish it.* (emphasis added).

[69] The court would now determine whether the defendants had practised responsible journalism, and had published a substantially fair account of what took place regarding the plaintiff:

(i) Seriousness of the allegation

It is without doubt that the allegation is serious. It concerns the conduct of the plaintiff who was then the director of examinations for the CLP Examination. He was convicted in the Sessions Court for offences involving dishonesty ie, falsifying the results of candidates in the CLP Examination. The conviction was upheld by the High Court.

(ii) The nature of the information and the extent to which the subject matter is of public concern

This would be similar to (i) above.

(iii) The source of the information

The first defendant's witness, Santhiran s/o Munisamy (DW1), the news officer, wrote the article based on the reports of a few journalists, including previous articles. He admitted that the words "for financial benefit" do not appear in the charges against the plaintiff, nor in the judgment of the Sessions Court and the judgment of the High Court. He did not know why the words complained of appear in the article, but he relied on information which was written much earlier by other journalists of the judicial proceedings concerning the plaintiff.

The second defendant's witness, Fauziah Ismail (DW2), the Deputy Chief News Editor, stated that based on its subscription contract with BERNAMA, they relied on the news materials from BERNAMA, which is a reliable source. The story was taken from BERNAMA "as is", without adding any further information. The second defendant honestly and reasonably believed that the information published is true.

The fourth defendant's witness, Sasi Kala a/p Narayanan (DW3), news editor, stated that the fourth defendant subscribes to the services of the first defendant to provide the first defendant with news articles for republication. DW3 further stated that the first defendant is a statutory body and the national news agency. It is a reliable news agency.

From the evidence adduced, the court is satisfied that the first defendant, being the Malaysia National News Agency, is a reliable news agency, and a reliable source of information for the second and fourth defendants.

(iv) Steps taken to verify the information

There is no evidence that the defendants took any steps to verify the information with the plaintiff. Learned counsel for the second defendant submitted that even if it had verified the information with the plaintiff, the plaintiff would not have responded to or made any contribution to it.

(v) The status of the information

The publication is regarding court proceedings on the plaintiff being found guilty and convicted of offences involving dishonesty. The information commands respect.

(vi) The urgency of the matter

The matter was of public interest and there was urgency to publish it the very next day after the High Court decision to the public who are interested to know the outcome of the plaintiff's appeal. News is a perishable commodity.

(vii) Whether comment was sought from the plaintiff

No comment was sought from the plaintiff.

(viii) Whether the article contained the plaintiff's side of the story

The article did not contain the plaintiff's side of the story.

(ix) The tone of the article

The tone is fairly objective, balanced and measured, with an absence of sensationalism.

(x) Circumstances of the publication including timing

The High Court decision was given on 20 April 2009. The article was published on same day by the first defendant. The fourth defendant republished it on 20 April 2009, whilst the second defendant republished it on 21 April 2009. There was no delay in publishing the article.

[70] From an evaluation of the above, even though the defendants did not approach the plaintiff to verify the information with the plaintiff (note: an approach to the plaintiff will not always be necessary under the *Reynolds* privilege), by the fact that the article and the impugned paragraph are regarding the judicial proceedings concerning the plaintiff's criminal offences and conviction and the High Court decision in dismissing the plaintiff's appeal, this court is not convinced that the defendants had practised irresponsible journalism. The court finds that the defendants had published the article which is substantially a fair account of the judicial proceedings. The article, read as a whole, is substantially fair except for the words "for financial benefit".

Those words, by themselves, are not capable of being defamatory of the plaintiff. As submitted by learned counsel for the fourth defendant, even the plaintiff himself, under cross-examination, agreed that those words "for financial benefit" by themselves are neutral words, and are not defamatory.

[71] The defendants are therefore protected fully by the defence of qualified privilege in the form of the *Reynolds* privilege, unless the plaintiff can prove malice on the part of the defendants.

[72] Learned counsel for the plaintiff submitted that the defendants published the article which caused the members of the public to be "misinformed" and confused. This shows that the publication of the news was done recklessly and in an irresponsible manner, and it can be termed as "presumed malice".

[73] The court finds that the plaintiff had at no time adduced any cogent evidence of malice on the part of the defendants. There is no proof that the defendants acted in bad faith to "misinform" or confuse the members of the public.

[74] On the other hand, the defendants have shown that they had published the article and the words complained of in all honesty, in good faith, and without any actual or express malice. It would be wrong to infer or presume malice on the part of the defendants just by the mere fact that the words complained of were published.

[75] In the case of the first defendant, the court further considers the submission of its learned counsel that the words complained of can only be attributed to the carelessness or negligence on the part of the journalist who first introduced these words into the article. However, this does not amount to malice.

Under Statute

[76] Section 12(1) and (2) of the DA provide as follows:

> Qualified privilege of newspapers
>
> 12.(1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matters as is mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.

(2) In an action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.

[77] Under ss. 12(1) of the DA, the words complained of that were published or re-published by the defendants, as the case may be, are privileged since the plaintiff failed to prove that the publication or republication thereof, within the context of the whole article, was made with malice by the defendants.

[78] The court has to balance the right to reputation and the freedom of expression of the press (see abstract, *Substantial Truth In Defamation Law* by Meiring de Villiers, University of New South Wales, School of Law, Australia, mdv@unsw.edu.au).

[79] Having weighed the evidence in totality, and after balancing the two conflicting rights, the court is satisfied that the defendants in the instant case ought to be given the immunity of the defence of qualified privilege based on common law and on statutory provisions.

Decision

[80] Going by the above considerations, on a balance of probabilities, the court holds that the first, second and fourth defendants are not liable to the plaintiff for defamation by reason of their respective defences raised.

[81] Accordingly, the plaintiff's claim is dismissed. The plaintiff is ordered to pay costs of RM12,000 to each of the three defendants.